No. 00-1558

In the Supreme Court of the United States

STUART M. SELDOWITZ, PETITIONER

v.

OFFICE OF THE INSPECTOR GENERAL,
DEPARTMENT OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Department of State properly promulgated regulations implementing the Privacy Act of 1974, and whether the Department properly followed its regulations relating to petitioner's Privacy Act amendment requests.

2. Whether petitioner's claims for damages are barred by the Privacy Act's statute of limitations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is unpublished, but the decision is noted at 238 F.3d 414 (Table). The orders of the district court (Pet. App. 12a-17a, 18a-25a) are unreported.

JURISDICTION

The judgment of the court of appeals was filed on November 13, 2000. A petition for rehearing was denied on January 9, 2001 (Pet. App. 26a). The petition for a writ of certiorari was filed on April 9, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Privacy Act of 1974 (the Act or Privacy Act), 5 U.S.C. 552a *et seq.*, governs the maintenance of records on individuals by federal agencies. The Act establishes fair information practices for the federal government. It restricts disclosure of personal information and gives individuals certain rights of access to and amendment of records pertaining to them. An agency may be held civilly liable, and liable for attorney's fees, for intentionally or willfully failing to fulfill the substantive requirements of the Act. 5 U.S.C. 552a(g). The Act provides a two-year statute of limitations. 5 U.S.C. 552a(g)(5).

Subsection (d) of the Act provides that on request, an individual shall have access to records that pertain to him within a system of records. 5 U.S.C. 552a(d)(1). An individual may request amendment of such records when he believes that they are not "accurate, relevant, timely, or complete." 5 U.S.C. 552a(d)(2)(B)(i). Such a request obligates the agency to amend the records or inform the individual of its reasons for refusing to amend. 5 U.S.C. 552a(d)(2). The individual has a right to an administrative appeal and, if such an appeal is denied, to review in the district court. 5 U.S.C. 552a(d)(3) and (g)(1).

The Privacy Act grants agencies the power to exempt investigatory systems of records from certain requirements of the Act, including the amendment provision. Under Subsection (j)(2), the head of an agency may by regulation exempt any system of records from any part of the Act, with exceptions not relevant here, if the system of records is "maintained by an agency or component thereof which performs as its principal function any activity pertaining to the

enforcement of criminal laws * * * and which consists of * * * information compiled for the purpose of a criminal investigation." 5 U.S.C. 552a(j)(2). The agency must state the reasons for the exemption. 5 U.S.C. 552a(j). Similarly, Subsection (k)(2) permits the promulgation of rules exempting "investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2)." 5 U.S.C. 552a(k)(2).

The Department of State has promulgated regulations, pursuant to 5 U.S.C. 552a(j)(2) and (k)(2), that exempt the systems of records maintained by the Department's Office of the Inspector General (OIG) from, among other provisions, the amendment provisions of Subsection (d)(2) of the Privacy Act. See 22 C.F.R. 171.32. Section 171.32(i) provides that OIG records are "exempted under 5 U.S.C. 552a(j) to the extent authorized and determined by the agency originating the records." According to the Department of State, these records are exempted under Subsection (j) "to the extent necessary to protect properly classified information and to assure the effective completion of the investigative and judicial processes." 56 Fed. Reg. 7071, 7073 (1991); 22 C.F.R. 171.32(h). The regulations further provide that OIG law enforcement records not covered by Subsection (j) of the Act may be exempt under Section 552a(k)(2). 22 C.F.R. 171.32(j)(2). The reasons for this exemption include preventing individuals who are the subject of investigation from frustrating the investigatory process, ensuring the integrity of law enforcement activities, and preventing disclosure of investigatory techniques. *Ibid.*

2. In 1989, petitioner began working at the Office of Strategic Nuclear Policy, within the Bureau of

Political/Military Affairs of the State Department. Pet. App. 64a. In 1990, petitioner served on the United States delegation to the Nuclear and Space Talks (NST) in Geneva, Switzerland. *Ibid.* Petitioner's wife served as secretary to the Deputy Negotiator on the NST's Defense and Space negotiating group. *Ibid.* Petitioner and his wife rented a private apartment together from February 9 through May 26, 1990. *Id.* at 65a. Both petitioner and his wife received full per diem compensation for their living expenses in Geneva. *Id.* at 64a. Their landlord provided separate receipts for the full amount of the rent to both petitioner and his wife. *Id.* at 65a.

Petitioner submitted a travel voucher for reimbursement with his rental receipt attached. Pet. App. 66a. He annotated the receipt, crossing out the full amount of rent and writing in half of the amount. *Ibid.* Petitioner alleges that he was thereafter instructed by telephone not to annotate his receipts, and did not make any further notations on subsequent vouchers. *Ibid.* Petitioner does not dispute that the full amount of rent appeared on the travel voucher that he signed. *Id.* at 2a.

3. In 1991, OIG investigated travel vouchers submitted by certain members of the United States delegation to the NST, including those of petitioner. Pet. App. 67a. Petitioner and his wife were informed that they were under investigation for submitting false claims against the United States by submitting vouchers for the full amount of their monthly rent while in Geneva. *Ibid.* Petitioner informed OIG during that investigation that he had annotated the first receipt to reflect half of the rent amount and that he had been instructed not to annotate any further receipts. *Ibid.*

In May 1995, the United States Attorney's Office for the Eastern District of Virginia informed petitioner that it was considering bringing a civil action against him under the False Claims Act (FCA), 31 U.S.C. 3729 *et seq.* Pet. App. 67a-68a. On June 15, 1995, petitioner met with officials from the Department of State, OIG and an Assistant United States Attorney. *Id.* at 68a-69a. At that meeting, petitioner was shown unannotated receipts from his first voucher. *Id.* at 69a. After retaining counsel, petitioner entered into a settlement of his false claims charges in the amount of $15,000. *Id.* at 69a-70a.

Petitioner subsequently requested from the National Finance Center a copy of his first travel voucher. Pet. App. 70a. On October 5, 1995, he received the voucher, with annotated receipts attached to it. *Ibid.* Upon receiving the voucher, petitioner "became [] aware that the U.S. Attorney's Office had possession of incorrect records." *Ibid.* In September 1995, the United States Attorney's Office conveyed to petitioner's attorney copies of the first voucher submission used in the false claims investigation. *Id.* at 15a. Petitioner did not receive these documents from his attorney until April 17, 1996. *Id.* at 71a.

On March 25, 1998, petitioner, through his attorney, requested that OIG amend its records. Pet. App. 75a. OIG requested an external investigation of the apparent discrepancy in its records. Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss 16-17. The government conducted an investigation to review the OIG investigation of petitioner. Pet. App. 75a. In response to a letter by petitioner, OIG explained by letter that it could not amend its records pending the completion of that investigation. *Id.* at 75a-76a. Prior to the commencement of petitioner's district court

action, no final administrative action by the agency took place on his request that his records be amended.

4. Petitioner filed a complaint in the United States District Court for the District of Columbia, seeking amendment of OIG files and records and damages to compensate for legal fees, the FCA settlement, and reputational and emotional harm. Pet. App. 60a-78a. Petitioner's theory of the case was that OIG deliberately used an incorrect copy of the voucher, and thereby induced the FCA suit. *Id.* at 60a-61a.

Count I charged that OIG violated 5 U.S.C. 552a(g)(1)(C) and (4) by failing to maintain the voucher records with such accuracy, relevance, and completeness as necessary to assure fairness in the determination whether to pursue the FCA suit against petitioner. Pet. App. 63a-73a. Count II claimed damages under 5 U.S.C. 552a(g)(1)(D) and (4) for OIG's intentional misuse of the voucher records to induce a settlement of the FCA suit. Pet. App. 73a-74a. Count III alleged that OIG violated 5 U.S.C. 552a(g)(1)(A) by refusing to amend its records pertaining to petitioner's travel vouchers, refusing to state why it denied such amendment, and failing to make a proper review of its denial. Pet. App. 74a-77a. Petitioner challenged OIG's decisions regarding three specific sets of records: records connected to OIG's FCA investigation of petitioner (FCA investigation records), the original audit records of the Geneva delegation (audit records), and records generated by an internal review of OIG's handling of the Geneva audit and ensuing FCA investigations (internal review records). The complaint requested over one million dollars in damages and amendment of records pertaining to petitioner's travel voucher. *Id.* at 77a-78a.

After the case was transferred to the Eastern District of Virginia, the district court held that Counts I and II were barred by the two-year statute of limitations under the Privacy Act. Pet. App. 13a-16a. The court determined that even on the face of the pleadings, petitioner had knowledge of the alleged misrepresentations regarding the annotations on his travel vouchers at least as early as October 1995 and that his April 1998 complaint was therefore filed too late. *Id.* at 15a-16a.

The district court subsequently granted summary judgment against petitioner on the remaining count of his complaint, which sought amendment of his files. The district court determined that the documents at issue were in part exempt from the requirements of the Privacy Act under 5 U.S.C. 552a(j)(2) and (k)(2) and the Department of State's implementing regulations, 22 C.F.R. 171.32(h), (i) and (j), and in part beyond the scope of the Privacy Act because they were not indexed or retrievable by the name of an individual. Pet. App. 18a-25a.

The court of appeals affirmed the dismissal of Counts I and II of the complaint on statute of limitations grounds, finding that petitioner was "aware of the alleged inaccuracies when the AUSA showed him the unannotated receipts on June 15, 1995. At that point, * * * the statute of limitations began to run." Pet. App. 6a. The court of appeals also affirmed summary judgment as to the investigatory and audit records created by the Department of State. *Id.* at 10a. Regarding the FCA investigation records, the court determined that "OIG records fall squarely within the general exemption which permits exclusion of records 'pertaining to the enforcement of criminal laws,'" and that Department of State regulations had properly

exempted the investigatory records. *Id.* at 7a (quoting 5 U.S.C. 552a(j)(2)). Regarding the audit records, the court concluded that even if the general exemption for criminal enforcement records did not apply, the specific exemption for "investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2)," 5 U.S.C. 552a(k)(2), did apply, and that the Department's regulations had properly exempted these records as well. Pet. App. 8a. Regarding the internal review records, the court remanded for further discovery as to whether those documents constituted records retrievable by name and were therefore potentially within the ambit of the Privacy Act. *Id.* at 9a-10a.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 3-15) that the lower courts erred in determining that the FCA investigation records and audit records were exempt from the Privacy Act amendment requirement. This contention lacks merit.

Petitioner relies on 22 C.F.R. 171.32(h) to argue that only files from ongoing investigations are exempt from the amendment requirements of the Privacy Act.[1] That

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[1] 22 C.F.R. 171.32(h) provides:

> Records originated by another agency when that agency has determined that the record is exempt under 5 U.S.C. [5]52a(j). Also, pursuant to Section (j)(2) of the Act, records compiled by the Special Assignment Staff, the Command Center, and the Passport and Visa Fraud Branch of the Office of Security and by the [I]nspector General may be exempted from the requirements of any part of the Act except subsections (b),

argument fails for two reasons: Subsection (h) does not independently control the exemption issue in this case and, even if it is viewed as the sole, relevant provision, it does not limit the law enforcement exemption to ongoing investigations.

As the court of appeals determined, the relevant portion of the regulation is Subsection (i), not Subsection (h). Subsection (i) states that "[p]ortions of the following systems of records are exempted under 5 U.S.C. 552a(j) to the extent authorized and determined by the agency originating the records," followed by a list that includes "Records of the Inspector General." 22 C.F.R. 171.32(i). Nothing in that subsection limits application of the exemption to ongoing investigatory or criminal processes.

In any event, even if (contrary to fact) Subsection (h) is viewed as the relevant provision, its clause explaining its purpose—ensuring the effective completion of investigations—does not limit its reach to pending investigations. Subsections (a)-(h) merely restate the types of materials that may be exempted under 5 U.S.C. 552a(j) and (k).[2] Subsection (h) deals with 5 U.S.C. 552a(j)(2), specifically mentions OIG, and provides the reason for such exemption: in order "to assure the effective completion of the investigative and judicial processes."[3] 22 C.F.R. 171.32(h).

(c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) to the extent necessary to assure the effective completion of the investigative and judicial processes.

[2] Indeed, immediately preceding Subsections (a)-(h), the regulation states that "[t]he following exemptions are authorized under 5 U.S.C. 552a(j) and (k)." 22 C.F.R. 171.32.

[3] Petitioner is therefore wrong in arguing (Pet. 14-15) that the regulation fails to state the reason for the exemption. Subsection

However, that statement of purpose does not limit the reach of the regulation. The reasons stated for an implementing regulation need not anticipate every possible factual scenario. See *Wentz* v. *Department of Justice*, 772 F.2d 335, 337-339 (7th Cir. 1985) (Subsection (j)(2) "does not require that a regulation's rationale for exempting a record from disclosure apply in each particular case.") (citation omitted), cert. denied, 475 U.S. 1086 (1986). The Privacy Act's broad exemption for criminal investigatory files permits the exemption of entire categories of records according to general rationales, provided they satisfy the requirements of the Act; an amendment request for a covered record may be denied without original, individual evaluation of the justifications behind such action. See *Aquino* v. *Stone*, 957 F.2d 139, 142 (4th Cir. 1992) ("While we can understand that [plaintiff] would want a more individualized evaluation of his file to justify the * * * claim of exemption, * * * we do not think that the Privacy Act was intended to provide an amendatory procedure for records about investigations into violations of the criminal laws."). Therefore, the applicability of the exemptions contained in 5 U.S.C. 552a(j) and (k), as implemented through 22 C.F.R. 171.32, does not hinge on whether the investigation has been completed in this case.

Petitioner contends (Pet. 10-13) that an Office of Management and Budget (OMB) circular interpreting the Privacy Act's law enforcement exemptions requires reversal of the lower court's opinion. Petitioner did not raise that argument until his petition for panel rehearing filed in the court of appeals. Compare Appellant's

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(h) provides the relevant reason, as the district court correctly held. Pet. App. 20a.

C.A. Br. and Appellant's C.A. Reply Br. with Appellant's C.A. Pet. for Panel Reh'g 9-11. Therefore, petitioner has waived further consideration of this argument. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992).

Regardless of whether petitioner's argument on this point is adequately preserved, the OMB circular in no way undermines the Department of State's promulgation of the regulations relevant here or its determination to delay acting upon petitioner's amendment claim. The circular simply states that agency heads may exempt systems of records under the Act's law enforcement exceptions upon a determination that those records fit within the exceptions; the exemption application is to be published as a rule and provide reasons therefor. See 40 Fed. Reg. 28,948 (1975). The Department of State's regulations published at 22 C.F.R. 171.32 implement the circular's directive: they represent the agency's determination, with accompanying reasons, that OIG investigatory files should be exempt under the Act. No further action by the agency head is required before the regulations may be applied to individual access and amendment requests.

2. Petitioner contests (Pet. 16-21) the lower courts' determination that Counts I and II of his complaint are barred by the statute of limitations. This factbound claim lacks merit and does not warrant further review.

The statute of limitations for actions for damages under the Privacy Act is two years. 5 U.S.C. 552a(g)(5). The statute contains a tolling provision, however, for cases of material and willful government misrepresentation:

> [W]here an agency has materially and willfully misrepresented any information required under this

> section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

5 U.S.C. 552a(g)(5). The question is when petitioner can be deemed to have discovered the alleged misrepresentation regarding the annotations on his reimbursement vouchers.[4]

Petitioner asserts (Pet. 17) that there is a split among the circuits regarding whether, in cases of alleged misrepresentation by the government, the statute of limitations for Privacy Act claims begins to run when a plaintiff has actual knowledge of the misrepresentation or, instead, when he merely has reason to know. Even if such a disagreement exists, it is not implicated by this case. Because both lower courts applied an "actual knowledge" standard in reviewing petitioner's claim—the standard more favorable to petitioner—any circuit split on this issue is not implicated. See Pet. App. 6a ("[Petitioner] had actual knowledge of the alleged error [in June 1995], and the fact that he did not make a physical comparison of the two sets of receipts until April 17, 1996, makes no difference."); Pet. App. 15a-16a ("Even based on the face of the pleadings, Plaintiff had knowledge of the alleged inaccuracies contained in the records at least as of October 1995.").

Petitioner had actual knowledge of the alleged misrepresentation no later than October 1995, and

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[4] OIG does not concede that the alleged misrepresentation was either material to the FCA investigation or willful on the part of the investigators. Petitioner pled no facts indicating willfulness of the alleged misrepresentation in his complaint.

therefore his complaint, filed in April 1998, ran afoul of the two-year statute of limitations.[5] According to petitioner's complaint, upon receiving his original voucher from the National Finance Center on October 5, 1995, he "became [] aware that the U.S. Attorney's Office had possession of incorrect records, these being the aforesaid unannotated rental receipts." Pet. App. 70a. Petitioner's complaint alleges he was unaware that OIG had willfully maintained an inaccurate record until he physically compared the voucher and attachments used in the FCA investigation with that from the National Finance Center. *Id.* at 71a-72a. However, the statute of limitations runs from the discovery of the discrepancy itself, not from the discovery that such discrepancy was deliberate. Section 552a(g)(5) provides for tolling where the agency has "materially and willfully misrepresented any information required under this section to be disclosed to an individual," but extends the statute of limitations no longer than "two years after discovery by the individual of the misrepresentation." 5 U.S.C. 552a(g)(5). By the terms of the statute, therefore, the running of the limitation period does not depend on the discovery of willfulness.[6]

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[5] Indeed, petitioner demonstrated knowledge of the allegedly inaccurate records prior to October 1995. He told OIG investigators of their mistake regarding the annotation of his rental receipts during the course of the investigation prior to the June 1995 meeting to discuss the FCA charge. Pet. App. 67a. Petitioner was shown unannotated receipts at that meeting, *id.* at 69a, and therefore had actual knowledge as of that point that the government had relied on incorrect copies of his vouchers in investigating his reimbursement requests.

[6] Even if the fact of willfulness rather than discovery of the underlying error were relevant to the statute of limitations analysis, petitioner has not explained how the side-by-side com-

Nor is there any merit to petitioner's claim that the courts erred in holding that he had knowledge of the alleged misrepresentation before he could physically compare the two copies—one annotated, one not—of his original vouchers in April 1996. Actual knowledge of government misrepresentation under the Privacy Act does not require physical possession of the relevant records. See *Bowyer* v. *United States Dep't of Air Force*, 875 F.2d 632, 636 (7th Cir. 1989), cert. denied, 493 U.S. 1046 (1990); *Nwangoro* v. *Department of the Army*, 952 F. Supp. 394, 397 (N.D. Tex. 1996) ("[T]he limitations period commences not when the plaintiff first obtains possession of the particular records at issue, but rather when he first knew of their existence.").[7]

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parison of the two copies of the voucher established willfulness on the government's part that was not evident to him before. Such a conclusory assertion need not control, even in the context of evaluating a motion to dismiss. See, *e.g.*, *Fernandez-Montes* v. *Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993) ("[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."); *Morse* v. *Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (same).

[7] Furthermore, petitioner's attorney gained possession of these documents in September 1995. Pet. App. 15a. It is well-established that a document transferred to an attorney is deemed to be in the possession of the client. See, *e.g.*, Fed. R. Civ. P. 5(b) ("Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney * * * ."); *United States* v. *Knohl*, 379 F.2d 427, 441-442 (2d Cir.) (criminal defendant not prejudiced by government's failure to disclose tape recordings before trial where recordings in possession of defendant's attorney), cert. denied, 389 U.S. 973 (1967). If service and other communications are effective upon receipt by a party's attorney, the statute of limitations should not be tolled in this case during the time between receipt and forwarding by petitioner's counsel.

3. Finally, petitioner's claims do not warrant further review for an additional reason: the interlocutory posture of the case. Because the court of appeals remanded for further discovery petitioner's claim regarding the internal review records, there will be further proceedings before the district court. This Court ordinarily does not grant a petition that seeks interlocutory review. See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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